Filed 10/27/09 P. v. Swain CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. THEODORE SWAIN, Defendant and Appellant.	D053185 (Super. Ct. No. SCD199072)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

A jury convicted Theodore Wesley Swain of fraud in the offer of securities (Corp. Code, §§ 25401 and 25540, subd. (b)[1]; counts 2, 3, 5, 6, 8, 9, 11, 13, 14, 16, 17, 18, 20, 22, 27); grand theft (Pen. Code, § 487 subd. (a); counts 4, 7, 10, 12, 15, 19, 21, and 26) engaging in fraudulent securities schemes (§§ 25541 and 25540; counts 28-33); and theft against elders (Pen. Code, § 368, subd. (d); counts 10, 15, and 19.) The jury found true

1 All further statutory references are to the Corporations Code unless otherwise stated.

allegations that his takings exceeded respectively $100,000 (Pen. Code, §§ 1203.044 subd. (d); 1203.45; counts 4, 7, 12, 21); $500,000 (Pen. Code, § 186.11, subd. (a)(2); counts 2-22; 26-33) and $2,500,000 (Pen. Code, § 12022.6, subd. (a)(4); counts 2-22; 26-33.)

The court sentenced Swain to 24 years in prison as follows: three years on count 3; eight consecutive one-year terms on counts 5, 8, 11, 13, 16, 20, 22, and 27; six consecutive one-year terms on counts 28 through 33; three consecutive years for the section 186.11, subd. (a)(2) enhancement and four consecutive years for the section 12022.6 subd. (a)(4) enhancement.

Swain contends: (1) the trial court prejudicially erred in failing to sua sponte instruct regarding unanimity; (2) insufficient evidence supported the count 33 conviction and (3) under section 654, the trial court erred in imposing consecutive sentences on counts 2, 5, 8, 11, 13, 16, 20 and 22 and, separately, on counts 28 through 33. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002, Theodore Swain founded First Fidelity Assurance Company (First Fidelity) to raise money for real estate development projects. Swain testified at trial that as First Fidelity's president, he established different development funds for different construction projects and sought investors for each development fund. Specifically, he established La Honda Project, Inc.; SoCal Development Fund LLC; New Mexico Development Fund LLC; Southwest Development Fund; and Southwest, El Segundo Fund. He mailed flyers advertising the projects to prospective investors and to those who

responded, a packet including a prospectus describing a particular project, a subscription agreement and a First Fidelity business card. The prospectuses stated the investors would receive "investment mortgage certificates," which were promissory notes identifying an ownership share or ownership interest and were secured by a first trust deed or warranty deed on real property that First Fidelity held.

Several individuals returned completed subscription agreements specifying the amount of their proposed investment in a particular development project to First Fidelity, which issued them mortgage certificates identifying their investment in a specific project, the investment amount, the interest rate, and the accrual date.

In approximately 2003, Swain started the La Honda project to build five detached homes in Escondido, California, but the homes were not built because of problems obtaining permits and a City of Escondido moratorium on construction due to water unavailability. In 2004, Swain started the SoCal Development Fund, LLC to build condominiums and a duplex in the area around Lake Elsinore, California, but construction of that project never started. Swain sold securities classified as series A, B, and C, for the Southwest El Segundo Fund to build 139 dwelling units in Deming, New Mexico. The securities were differently classified based on the different time periods before they became redeemable; they yielded higher interest rates the longer the investment period. Only two model homes were completed.

Swain testified he did not disclose to investors, either in the prospectuses or otherwise, his previous bankruptcy and three prior convictions for grand theft based on his prior real estate dealings. He explained he had never seen that kind of information

disclosed in prospectuses. Swain sent the investors a quarterly newsletter, but never notified them of construction delays.

In 2006, Swain was served a cease and desist order to stop offering or selling securities. He was arrested in 2006.

Sue Tankersley, a certified fraud examiner, performed a forensic accounting of First Fidelity's records and testified that from 2002 through 2006, approximately 100 individuals invested approximately $7,589,496 in all First Fidelity accounts, and they lost approximately $6,600,838. Approximately 90 percent of investors incurred significant losses. She opined, "First Fidelity and its related companies operated as a Ponzi scheme. It is clear to me that that [*sic*] is what was going on here, that the only money brought in to this company was brought in by investors; the only money paid out to investors was from other investor money."

The prosecutor argued to the jury that Swain operated a Ponzi scheme by using some investors' money to pay off other investors. Swain made material misrepresentations or omissions to investors by failing to disclose his prior grand theft convictions and his bankruptcy. He misrepresented both that First Fidelity derived profits from other than investor money and the mortgage certificates were secured by first trust deeds to real property that First Fidelity held.

Defense counsel argued that Swain never intended to defraud the investors or steal from them. Rather, Swain did not disclose his bankruptcy or his prior convictions because it was not material, as successful people often have bankruptcies for various reasons before becoming successful. Furthermore, it is "very rare" for a company

president to include those topics in prospectuses. Defense counsel added that the investors did not regard any misrepresentations or omissions Swain made as material at the relevant time, which was when they made their investments, but only after their investments failed. Defense counsel argued Swain lacked the intent to operate a Ponzi scheme because Swain had not made windfall profits. He argued: "Ladies and gentlemen, in a Ponzi scheme, why? The question is, why would you spend so much effort developing this property if *your only intent is to derive income and take the money from investors*?" (Emphasis added.)

DISCUSSION

I.

A.

Swain contends that as to the counts alleging sale of securities by false statements or omissions under section 25401[2]: "[T]he trial court was required to give a unanimity instruction requiring the jury to agree on a particular act, representation or omission and its materiality," and failure to so instruct was reversible error. He explains, "[J]urors might have viewed all the representations or omissions offered by the People as one big misrepresentation or as many smaller but material misrepresentations. For instance, the jury learned that appellant had suffered a bankruptcy in connection with a prior business.

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2 Section 25401 provides: "It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." This crime was alleged in counts 2, 3, 5, 6, 8, 9, 11, 13, 14, 16, 17, 18, 20, 22 and 27.

Some jurors might have decided the individual fact of the bankruptcy was immaterial because 1) bankruptcies occur in the business world or 2) no evidence demonstrated the bankruptcy was related to a similar securities offering. Others might have determined otherwise. Equally plausible was a split of opinion as to whether appellant knew, or should have known, about the water moratorium at the time of the La Honda offering. In more general terms, six jurors could have believed that only statement A, or a group of statements bunched together as statement A, was a material representation and the remaining jurors could have believed that only statement B, or a group of statements constituting statement B, was a material misrepresentation. In other words, while any number of material misrepresentations made in one sale or offer constituted only one offense . . . the jury might have concluded that a single material misrepresentation occurred in several offers or sales, thereby constituting multiple offenses [citation], but treated as a single offense."

" 'It is fundamental that a criminal conviction requires a unanimous jury verdict [Citations.].' [Citation.] What is required is that the jurors unanimously agree defendant is criminally responsible for '*one discrete criminal event*.' [Citation.] '[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed in the words of [CALCRIM No. 3500] or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.' " (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) When an instruction is essential to ensure the constitutional guarantee of

unanimity, the trial court has a sua sponte duty to give it. (*People v. Crawford* (1982) 131 Cal.App.3d 591, 596.)

The California Supreme Court held in *People v. Russo* (2001) 25 Cal.4th 1124 (*Russo*) that jury unanimity is not required on the specific theory of guilt or particular method of commission of the crime. "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. . . . In deciding whether to give the [unanimity] instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at pp. 1134-1135.)

Russo held that when the evidence "shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Russo*, *supra*, 25 Cal.4th 1124 at p. 1132.) The *Russo* court cited *People v. Jones* (1986) 180 Cal.App.3d 509, 516, which stated in reference to a conspiracy conviction, that " 'the jury only need be unanimous in finding *an* overt act was done in furtherance of the conspiracy, not in finding a particular overt act was done.' " (*Russo, supra*, at p. 1133.)

The trial court did not err in failing to instruct sua sponte regarding unanimity. Each of the counts, except counts 2 and 22, which we will address separately, alleged that Swain sold one security on a specific date to either a single individual or a married couple. Therefore, no likelihood existed that some jurors would conclude Swain was guilty of one crime and others think he was guilty of a different crime. As in *Russo*, here the jurors were not required to agree on the particular misrepresentations or omissions that they relied on for the convictions because that finding merely relates to the manner of committing the crime. The dispositive issue was that in each case the jurors found Swain guilty of one crime of securities fraud, based on at least one misrepresentation or omission. (Accord, *Russo*, *supra*, at p. 1135.)

In any event, we conclude any error was harmless. "[I]n order for the unanimity instruction to make a difference, there must be evidence from which jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1502 (*Brown*).) In contrast, when the jury is presented with an all-or-nothing choice, a unanimity instruction is unnecessary or, if error, harmless. (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539.) In *People v. Vargas* (2001) 91 Cal.App.4th 506, 561, the court acknowledged that "[t]here is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction." Some cases apply the "harmless beyond a reasonable doubt" standard under *Chapman v. California* (1967) 386 U.S. 18, 24; other cases apply the standard from *People v. Watson* (1956) 46 Cal.2d 818, 836, which is whether "it is reasonably probable that a result more favorable to the appealing party

would have been reached in the absence of the error." (See e.g., *People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299 [applying *Watson*]; *People v. Deletto* (1983) 147 Cal.App.3d 458, 473, [applying *Chapman*].)

Here, the jurors were instructed with CALCRIM No. 220 requiring them to find guilt beyond a reasonable doubt. Swain himself testified he did not inform the investors regarding his bankruptcy and his prior convictions. Several victims testified they would not have invested in the schemes if they had known about those facts. The fraud examiner testified the investors were paid from other investors' money, and Swain produced no evidence to the contrary. No trial evidence showed that the mortgage certificates were secured by First Fidelity's ownership of real property. The jury was not presented with "evidence from which jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes." (*Brown*, *supra*, 42 Cal.App.4th 1493at p. 1502.) Moreover, Swain relied on the sole defense that he did not make any material misrepresentations or omissions and did not intend to defraud. As stated in *People v. Riel* (2000) 22 Cal.4th 1153 (*Riel*), "this *is* 'a case where the jury's verdict implies that it did not believe the only defense offered.' " (*Id.* at p. 1200.)

Swain contends, "While, here, a securities violation could occur by either an oral or written misrepresentation of fact — which some might consider 'theories' — the omission or [mis]representation of fact must have been material and 'materiality is not a theory, *but rather is an element of the crime.*" (Emphasis added.) This argument is unavailing because as stated in *Russo*, "We do not doubt that the requirement of an overt act is an element of the crime of conspiracy in the sense that the prosecution must prove

it to a unanimous jury's satisfaction beyond a reasonable doubt. But that element consists of *an* overt act, not a *specific* overt act." (*Id.* at p. 1134.) Likewise, here, irrespective of whether the materiality of the misrepresentation or omission is an element of the crime, the prosecutor was required to and did prove beyond a reasonable doubt to the satisfaction of a unanimous jury that Swain made *a* material misrepresentation or omission, not a *specific* one.

B.

The information, a copy of which was introduced into evidence, alleged in count 2 that "on and between August 16, 2005 and October 3, 2005," Swain offered to sell Charles and Hava Adams a security in the SoCal Development Fund, LLC. The evidence regarding this count included an August 13, 2005 check from Charles Adams for $ 22,500 payable to "SoCal Development Fund," and a mortgage certificate dated August 15, 2005, which documented the Adams's investment. The prosecutor explained to the jury in closing argument, "Then we have count 2 . . . [w]e have the fraud and the offer of the security, where the offer of the security is made, which we know there's no dispute, these were securities, where material misrepresentation or omission is made. We have that alleged as a continuing course of conduct in this particular charge during that time frame. [¶] Then we have a separate fraud in the offer of the security alleged, a new one, and in this case you'll see there's facts that represent a reloading or a roll over on October 3rd of 2005."

We conclude that as to count 2, the trial court was not required to instruct regarding unanimity, notwithstanding that the prosecutor referred to a roll over from a

first security offer into a second security offer that occurred approximately six weeks later. The two security offers formed part of one ongoing security offer such that the jury could not, in practical terms, find the first security offer was a crime without simultaneously finding the roll over was a continuation of the crime. Stated differently, the jury necessarily would find that the roll over security offer can only be understood in light of the predicate first offer, although approximately six weeks intervened between the two offers. Accordingly, there is no reason to conclude that some jurors would agree that only the initial security offer was a crime while others agreed only the second roll over security offer was a crime. They necessarily reached a unanimous verdict on the same basis. In any event, any error was harmless beyond a reasonable doubt because Swain relied on the sole defense that he did not intend to defraud and did not make any material misrepresentations or omissions.

The information alleged as to count 22 that "on and between October 4, 2005, and December 1, 2005," Swain unlawfully offered a security to Albert and Tamara Petrosian in Southwest Development Fund, Phase 1 (Series A) LLC. Albert Petrosian testified he invested $300,000 with First Fidelity. The evidence regarding this count included one check from Albert Petrosian dated September 30, 2005, for $300,000 and made payable to "Southwest Development Fund 1 A" and two mortgage certificates, each dated October 4, 2005, documenting an investment by the "Petrosian Family Trust" of $150,000, at an interest rate of 9.5 percent. First Fidelity paid Albert Petrosian interest on his $300,000 investment. He testified that around November 26, 2005, he purchased three additional securities, one for each of his three grandchildren, for $24,000 each.

This amount represented the maximum federal tax limit on gifts he could make to each of his grandchildren. First Fidelity issued him three separate mortgage certificates for those securities.

Swain contends the unanimity instruction was required as to count 22 because "the evidence reflected more than one purchase of a security interest in the Southwest Development Fund." Again, based on the above analysis, we conclude the instruction was not required. Swain did not introduce evidence from which the jurors could both agree and disagree regarding the relevance of the various checks to support the count 22 charge. Therefore, the jurors unanimously agreed beyond a reasonable doubt that each of the checks was related to the charged crime, and Swain made material misrepresentations or omissions to Albert Petrosian. Moreover, as we stated, any error was harmless because the jury by its verdict clearly rejected Swain's sole defense to the charges, which was that he lacked the intent to defraud. (*Riel*, *supra*, at p. 1200.)

C.

Swain contends the trial court erred in not giving a unanimity instruction regarding counts 4, 7, and 12 alleging grand theft because they each allege the purchase of more than one security over a period of time, as opposed to on one specific date.[3]

Penal Code section 487, subdivision (a) provides that grand theft is theft committed "when the money, labor, or real or personal property taken is of a value

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3 Specifically, the information alleged purchases occurring between October 25, 2005, and March 6, 2006 for count 4; March 12, 2006, and February 2, 2006 for count 7; June 14, 2005, and October 31, 2005 for count 12; March 16, 2005, and October 19, 2005 for count 15; and October 4, 2005, and December 1, 2005 for count 21.

exceeding four hundred dollars." The jury was instructed regarding the intent element of grand theft by false pretense: "To prove that the defendant is guilty of the crime the People must prove that: [¶] 1. A person made or caused to be made to the alleged victim by word or conduct, either: (1) a promise without intent to perform it, or (2) a false pretense or representation of an existing or past fact known to the person to be false or made recklessly and without information which would justify a reasonable belief in its truth; [¶] The person made the pretense, representation or promise with the specific intent to defraud; [¶] 3. The pretense, representation or promise was believed and relied upon by the alleged victim and was material in inducing them to part with their money or property even though the false pretense, representation or promise was not the sole cause."

Again, we conclude there was no error in failing to instruct regarding unanimity because for each of the grand theft counts, "there must be evidence from which jurors could *both* accept *and* reject the occurrence of at least the same number of acts as there are charged crimes." (*Brown*, *supra*,42 Cal.App.4th at p. 1500.) Here, there was no evidentiary basis for the jury to conclude that some of the acts of grand theft, but not others, were crimes. Moreover, as we noted above, Swain's sole defense against all grand theft charges was that he did not intend to defraud the investors and made no material misrepresentation or omissions to the investors. The jury by its verdict impliedly rejected this defense. (*Riel*, *supra*, at p. 1200.)

D.

Swain contends the trial court erroneously failed to give a unanimity instruction regarding counts 28 through 33, which alleged he engaged in fraudulent securities schemes under section 25541.

Section 25541 provides for punishment by a fine or imprisonment for: "Any person who willfully employs, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security or willfully engages, directly or indirectly, in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, or sale of any security."

Except for the word "act," all the terms defining this offense, by their nature, describe a course of conduct. "Scheme" is defined as "a plan or program of something to be done. (Webster's New Internat. Dict. (3d ed. 1966) p. 2029.) "Device" is defined as "something that is formed or formulated by design and usually with consideration of possible alternatives, experiment, and testing." (*Id.* at p. 618.) "Artifice" is defined as "a wily or artful stratagem." (*Id.* at p. 124.)

Swain concedes section 25541 contemplates a course of conduct, but maintains that he was charged with more than one scheme or plan to defraud; therefore the instruction was necessary "to guarantee that the verdicts on each count indeed reflected the jury's agreement that the alleged scheme had been committed as opposed to a conclusion [he] engaged in one big scheme which may or may not have included the separately charged offerings subject of counts twenty-eight through thirty-two."

As Swain testified and the documentary evidence showed, the different schemes were marketed with their separate prospectuses; on the subscription agreements, investors elected the specific investment scheme they were interested in, and they were issued mortgage certificates identifying the exact investment scheme in which they had invested. Therefore, contrary to Swain's contention, there was no likelihood that some jurors convicted him for running a giant investment scheme that incorporated all the different investment funds, while other jurors convicted him based on one specific securities scheme.

IV.

Swain contends insufficient evidence supports the count 33 conviction that he "did willfully and unlawfully engage in acts, practices and a course of business which operated as a fraud and deceit upon a person or persons in connection with the offer of a security" to persons who "purchased investment mortgage certificate units in New Mexico Development Fund" under sections 25540, subdivision (a) and 25541.

John Blosser testified he invested in the New Mexico Development Fund and he received a "New Mexico Investment Mortgage Certificate" that documented his investment. Blosser was not informed regarding Swain's bankruptcy, prior convictions or that First Fidelity had not received proceeds apart from investor money. He testified if he had been informed of those matters, he would not have invested in First Fidelity. He received no return on his investment. Separately, the record includes correspondence from Swain to William and Mary Stegeman enclosing "subscription documents for the ' New Mexico Development Fund Investment Mortgage Certificate" and copies of checks

showing the Stegemans paid $40,000 to New Mexico Development. The certified fraud examiner testified regarding the Stegemans' checks and traced Swain's total deposit of $8000 investors' funds in a bank account for the New Mexico Development Fund LLC. This evidence suffices to support the count 33 conviction.

V.

Swain contends that under Penal Code section 654, the court erred in not staying the sentences on counts 2, 5, 8, 11, 13, 16, 20 and 22, alleging fraudulent sales of securities, "where each of those counts was part and parcel of counts 28, 29, or 30 [alleging fraudulent securities schemes]." He claims, "Stated otherwise, the various schemes in counts [28-30] were the means by which both the unenumerated victims and the enumerated victims handed over their money to [him] and thus the product of a general or overall plan with the single objective of obtaining their money." He also contends the trial court erred in imposing consecutive terms for the separate securities fraud schemes in counts 28-33, which instead "must be deemed a single overall scheme and all but one of the sentences thereon must be stayed."

Penal Code section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute precludes multiple punishments not only for a single act, but for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.)

The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Beamon* (1973) 8 Cal.3d 625, 630-639 (*Beamon*).) The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Coleman* (1989) 48 Cal.3d 112.) If the trial court does not make an express finding, an implied finding that the crimes were divisible inheres in the judgment and must be upheld if supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

Furthermore, under Penal Code section 654, "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*Beamon, supra,* 8 Cal.3d 625, 639, fn. 11; see, e.g., *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1254.) "If the offenses were committed on different occasions,

they may be punished separately." (*Kwok*, at p. 1253.) This is particularly so when offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. (*Id*. at pp. 1326, 1255-1256.)

Here, it is apparent from the record that each charged crime occurred at a different time.[4] We find this court's ruling in *People v. Lochmiller* (1986) 187 Cal.App.3d 151 controlling. In that case, we considered the applicability of Penal Code section 654 to the sales of unregistered securities within the meaning of section 25110. (*Lochmiller*, *supra*, at p. 152.) Defendant Lochmiller sold the unregistered securities in 11 separate sales to 10 investors, making sales at different times to different individual investors. (*Ibid*.) In that case, as here, it was argued that the defendant was susceptible to punishment on only

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4 The People point out: "Counts 2, 5, 8, 11, 13, 16, 20 and 22 involved different victims and different dates: Hava Adams (count 2 — on and between August 16, 2005 and October 3, 2005), James Bean (count 5 — October 25, 2005), William Dyckman (count 8 — March 12, 2004), Leo and Sharon Goble (count 11 — November 19, 2004), Robert Hill (count 13 — June 14, 2005), Melvin Kirkland (count 16 — March 16, 2005), Edward Nesbitt (count 20 — October 7, 2004), Albert Petrosian (count 22 — on and between October 4, 2005 and December 1, 2005), and Don and Roberta Sewell (counts 26-27 . . .). Counts 28 through 33 alleged that Swain operated . . . fraudulent business schemes over many months, and each scheme had at least one victim who was not named in counts 2, 5, 8, 11, 13, 16, 20, and 22. Specifically, count 28 involved the operation La Honda from March 1, 2003 through May 30, 2006 and Mike Wu was defrauded . . .; count 29 involved the operation of SoCal from May 1, 2004 through May 30, 2006 and Mary Koop was defrauded . . .; counts 30 through 32 involved the operation of Southwest, Series A, B, and C, and George Naff was defrauded in Series A . . ., John Blosser was defrauded in Series B . . ., and Tracy Jonah was defrauded in Series C . . .; and count 33 involved the operation of the New Mexico Development Fund from September 1, 2004 to May 30, 2006 and John Blosser and the Stegemans were defrauded in that account." (Some capitalization omitted.)

one count because there was no evidence of more than one intent. (*Id*. at p. 153.) We rejected the claim and held that the single objective in selling unregistered securities to obtain money did not bar multiple punishment for each separate sale, because the unlawful sales occurred at different times, for different amounts, to different victims. (*Ibid*.) Accordingly, punishment for each separate sale to an individual investor was not prohibited by section 654. (*Lochmiller*, *supra*, at p. 154.) Likewise, defendant's acts here were separate transactions occurring at different times, for different amounts, with different victims. Over the course of four years, defendant defrauded approximately 90 individuals. Applying *Lochmiller's* reasoning, we reject Swain's Penal Code section 654 argument.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.